

## COMMENTARIES

### THE AMBIGUOUS WORK OF “NATURAL PROPERTY RIGHTS”

Gregory S. Alexander\*

The three fascinating papers by Dick Helmholz, Jim Ely, and Mark Tushnet prompt me to ask, why was there so much talk among late-eighteenth- and nineteenth-century American lawyers about property as a “natural” right, and why has the language persisted today? More specifically, what work is the rhetoric of “natural property rights” intended to do? This is not the proper occasion for developing anything like complete answers to those questions, but I do want to offer three lines of thought that might begin to approach something like a fuller explanation of the puzzling persistence of natural-property-rights talk.

The first line of thought begins with a point that Dick Helmholz’s and Jim Ely’s papers make.<sup>1</sup> They provide abundant evidence that in the nineteenth century there was plenty of talk about natural rights. Their papers also establish the fact that this natural-rights talk was commonly associated with property.<sup>2</sup> Prompted by Mark Tushnet’s paper,<sup>3</sup> I want to ask, what do we do with this talk about property as a natural right? What work does such talk do? What traction were those who used such talk in the nineteenth century trying to get with it? And more importantly, what traction are those today who point to the conspicuous existence of such talk in the past trying to get with it?

The answer lies in the notion of a natural right, particularly the natural right of property, as *fundamental*. Those who used natural-rights talk in the nineteenth century and the modern-day chroniclers of that nineteenth-century talk commonly associate the term *natural right* with the term *fundamental*.

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\* A. Robert Noll Professor of Law, Cornell Law School.

<sup>1</sup> James W. Ely, Jr., “To Pursue Any Lawful Trade or Avocation”: *The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917 (2006); R. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 U. PA. J. CONST. L. 401 (2006).

<sup>2</sup> Helmholz’s paper importantly points out, however, that, although property was a locus for much natural-law talk, natural-law thinkers had no canon of specific rights. He also notes that “[i]n [early nineteenth century] practical jurisprudence, the law of nature was thought to play a basic but limited role.” Helmholz, *supra* note 1, at 402.

<sup>3</sup> Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209 (2006).

But this really just moves the question back a step. What traction do the users of the term, "natural right as a fundamental right," think they are getting by attaching the characterization *fundamental* to the term *natural right of property*?<sup>2</sup> The move is made, I think, to give the constitutional right of property more bite than it currently has. The goal is to make the constitutional property right, whether via the Due Process Clause or the Takings Clause, the basis of resisting all manner of regulation of a wide variety of economic interests.<sup>4</sup> Labeling an economic interest a *fundamental natural right* is a tactic aimed at ending all further argument. By virtue of being covered by such a right, the interest transcends all debate about the legitimacy of government actions undertaken to achieve collective goals defined through the processes of ordinary democratic politics. The interest is simply beyond such collective control, and that's the end of it.

There are, of course, a number of serious problems with this move at the level of legal theory. When the move is made in a concrete context, things get really tricky. First, the locution of individual rights may distinguish between property as a *natural* (and unenumerated) right and property as a *fundamental* (and unenumerated) right, on the one hand, from property as an *entrenched* right. Gerald Stourzh, in a paper that Dick Helmsholz cites,<sup>5</sup> distinguishes between fundamental rights and entrenched rights.<sup>6</sup> A fundamental right may be an entrenched right, but not necessarily. A right may be fundamental or natural not because it is in some special separate category but simply because it is thought to be essential to the ordering of the law of the land. Under this view, determining that property as a fundamental or natural right does little in reaching the ultimate goal of immunizing property holdings from redistributive governmental regulations. True, the abstract right to property, even though constitutionalized, is recognized as constitutive of the legal order. But particular, concrete property interests or holdings need not be given the kind of immunity that Professor Epstein and other practitioners of the rhetoric of the natural right to property hope to secure through their discursive tactic.

A second problem, as Helmsholz's paper shows,<sup>7</sup> is that the theory of property as a natural or fundamental right is indeterminate. Historically, natural-law theory, both in general and in the context of

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<sup>4</sup> That this is the ultimate aim of such property talk is made most abundantly clear in, of course, RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

<sup>5</sup> See Helmsholz, *supra* note 1, at 419 n.123.

<sup>6</sup> Gerald Stourzh, *Fundamental Laws and Individual Rights in the 18th Century Constitution*, in *THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION* 159, 169-70 (J. Jackson Barlow et al. eds., 1988).

<sup>7</sup> Helmsholz, *supra* note 1, at 413-16.

property, had multiple valences.<sup>8</sup> Although there was a lot of natural-law talk about property, that very rhetoric could be and at times was used not in favor of the minimalist nightwatchman state but against that vision, specifically against the vision of immunizing property holdings from collective interference. It might be used as the basis for justifying the redistribution of property holdings, because, as Helmholz puts it, "the government had a duty to establish good order, sometimes even at the expense of the rights of individuals."<sup>9</sup> On this view, the notion of property as a fundamental natural right has been used not only in a negative respect, that is, to protect economic rights against deprivations by the state, as Jim Ely's paper discusses, but also to ground a less familiar conception of property: property as the foundation for the properly ordered society, or what in an earlier book I called "property as propriety."<sup>10</sup> By that, I mean a conception of property according to which "property is [viewed as] the material foundation for creating and maintaining the proper social order, the private basis for the common good."<sup>11</sup>

Many natural-law writers, including nineteenth-century American legal writers, were "preoccup[ie]d . . . with theories of the common good."<sup>12</sup> Their theory of natural law was not the theory of the limited state and vested rights, the stuff of Edward Corwin's classic account of the "higher law" tradition,<sup>13</sup> but the theory "[t]hat man was made for *society* . . . [and] that the *public good* ought always to be the supreme rule . . ."<sup>14</sup> On this social understanding of the law of nature, an understanding shared by several of the Founders and leading American jurists, including James Wilson and Chancellor Kent,<sup>15</sup> the purpose of government was not to shield autonomous individuals from the state

<sup>8</sup> See Bret Boyce, Property as a Natural Right and as a Conventional Right in Constitutional Law 13, 24–26 (unpublished manuscript, on file with author) (discussing views of property from ancient times through the middle ages and the modern era as a less-than-absolute right with corresponding social obligations).

<sup>9</sup> Helmholz, *supra* note 1, at 412.

<sup>10</sup> GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970 passim* (1997).

<sup>11</sup> *Id.* at 1.

<sup>12</sup> WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 28 (1996).

<sup>13</sup> See Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 366–71 (1929) (tracing to the Tudor period in England the roots of the American constitutional idea that higher law limits legislative power); see also Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 255 (1914) ("[T]he Doctrine of Vested Rights[,] . . . setting out with the assumption that the property right is fundamental, treats any law impairing *vested rights*, whatever its intention, as a bill of pains and penalties, and so, void.").

<sup>14</sup> *Rutgers v. Waddington* (N.Y. Mayor's Ct. 1784), reprinted in *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674–1784*, at 302, 312 n.1 (Richard B. Morris ed., 1935) (footnote contributed by Samuel Loudon, editor of the original printing).

<sup>15</sup> See NOVAK, *supra* note 12, at 29–31.

so that they were free to pursue their subjective preferences. Rather, individuals were inextricably bound to society and were obligated to act in the best interests of the community as a whole. Natural law, on this view, repudiated rather than promoted what C.B. Macpherson called possessive individualism.<sup>16</sup>

The late-nineteenth- and early-twentieth-century proprietarian understanding of property was premised directly on this version of natural-law thinking. In the proprietarian tradition of property, courts often found it entirely proper, indeed necessary, for the state to impose legislative restrictions on the possession, use, or transfer of certain items of property. These restrictions were valid, not simply as a matter of convenience or expediency, but as a matter of protecting the commonweal and vindicating the natural order of things—as a matter of natural law. It was in just these terms, for example, that the U.S. Supreme Court in 1877 rejected a constitutional challenge to a Massachusetts law prohibiting the manufacture of, or trafficking in, alcoholic beverages.<sup>17</sup> Indeed, the modern notion of the police power owes its acceptance to this version of natural law and the relationship between natural law and the right of property.

From this perspective, Robin West's notion of "unenumerated duties"<sup>18</sup> is particularly valuable. One way of understanding the public-trust doctrine, for example, is in terms of the state's unenumerated duty to maintain certain resources as open to the public. So, when the Supreme Court in *Illinois Central Railroad Co. v. Illinois* held that the Contract Clause<sup>19</sup> did not prohibit the Illinois state legislature from revoking its earlier grant of submerged land along Chicago's lakefront because the grant had violated the state's duty to hold the land in trust for the public's benefit,<sup>20</sup> it was not creating a new state duty. In the Court's own view, it was simply recognizing a preexisting—unenumerated—state duty, a duty that the state has always owed to the public.<sup>21</sup> Moreover, preexisting, natural duties to the public may exist with respect not only to the state as property owner but also to private owners. This is the theory that courts have used in recent years to explain expanding public access to dry- as well as wet-sand portions of beaches.<sup>22</sup> Such property is inherently public, and the du-

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<sup>16</sup> C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 3, 263–64 (9th prtg. 1983) (1962).

<sup>17</sup> *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877).

<sup>18</sup> Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006).

<sup>19</sup> U.S. CONST. art. I, § 10, cl. 6.

<sup>20</sup> 146 U.S. 387, 455–56 (1892).

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g., Glass v. Goeckel*, 703 N.W.2d 58, 62 (Mich. 2005) (concluding that, since "large bodies of navigable water . . . belong to the public," Michigan "lacks the power to diminish those rights when conveying littoral property to private parties"), *reh'g denied*, 703 N.W.2d 188

ties that its private owners owe the public preexist any act of positive law.

There is a second sense in which the works that talk of property as a natural or fundamental right are ambiguous. When we speak of the right of property being a natural or unenumerated right, what purposes or functions of property do we have in mind? Property serves multiple functions, of course, and one may not think that they are all equally important. So we might think that property for shelter, for example, is more important than property used as the means for creating personal wealth.<sup>23</sup> Distinctions of this sort might apply even when we speak about rights that are commonly termed "economic rights." For example, the right to an occupation, upon which Jim Ely particularly focuses, obviously serves a wealth-creating function, but there is more to the right than that alone.<sup>24</sup> Work is also a source of dignity. It may also be said to be required for effective citizenship.

The point is that when we talk about property or economic rights as being "natural," "fundamental," or "unenumerated," we may find it necessary, or at least useful, to specify the function that the particular asset or interest in question primarily serves. This sort of purposive analysis of interests might, though it need not necessarily, lead us to develop a kind of hierarchy of property functions according to which the constitutional right of property is fundamental for some purposes but not for others.<sup>25</sup>

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(Mich. 2005), *cert. denied*, 126 S. Ct. 1340 (2006); *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 360 (N.J. 1984) ("[L]and covered by tidal waters belong[s] to the sovereign, but for the common use of all the people." (internal quotation marks omitted)), *cert. denied*, 469 U.S. 821 (1984).

<sup>23</sup> See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 988–91 (1982) (distinguishing property rights essential to personhood from nonproperty rights and property rights not essential to personhood). I realize that such lines cannot be drawn in any sort of categorical way, and that the categories, even if I did create them, would quickly blur. But I do not think that the fact that the categories blur means that the distinction is entirely unintelligible. Property for shelter includes one's home or apartment, and one's home is not simply a wealth-creating asset, even though many people may use it for that function as well. Few people think of the home they own and in which they live (or at least live most of the time) as solely or even primarily as a wealth-creating asset.

<sup>24</sup> See generally Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997) (describing the rich relationship between occupation and social life).

<sup>25</sup> This is precisely the approach that the Federal Constitutional Court of Germany has taken with respect to their constitutional property right under article 14 of the basic law. GRUNDGESETZ [GG] [Constitution] art. 14 (F.R.G.). The Court has created explicitly a hierarchical, categorical approach to property as a constitutional right based on distinctions drawn among several different functions of property. The Court's basic view is that when the primary function of the property interest in question is to provide for, or to protect, personal security, such as protecting a place for one to live, that interest is entitled to greater weight and greater protection. For a full discussion, see GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 103–04, 139–47, 218–19 (2006).

The third line of thought I want to offer is a thought experiment: What if property had never been explicitly mentioned in the American Constitution? Would anything be different today? Since the question is counterfactual, there is of course no definitive answer. But as Mark Tushnet noted in his paper, "texts are available for pretty much everything" today.<sup>26</sup> There are a lot of textual candidates for hosting a constitutional right to property. The Due Process Clause<sup>27</sup> and Privileges and Immunities Clause<sup>28</sup> are just two that come quickly to mind. Moreover, at least some aspects of the constitutional right to property might have been protected via other constitutional provisions that do not mention the term "property" at all. That is what has happened in Canada, for example, whose Charter of Rights and Freedoms does not mention property.<sup>29</sup> There was, as those of you who are familiar with Canadian human-rights law know, an extended and very heated debate over the precise question of whether to include property as an entrenched right, and the decision was not to do so.<sup>30</sup> There were a number of reasons for the decision, but one important consideration was that many participants in the debate viewed protection of property as an entrenched right as unnecessary because other provisions of the Charter of Rights and Freedoms would protect some property against some form of governmental interference. Moreover, under Canada's background private-law traditions and culture, property had achieved a sufficiently *de facto* entrenched status that formal entrenchment under the charter was considered unnecessary.

We in the United States, of course, share much of Canada's legal background, tradition, and culture. There are differences at the margin but not really at the core. So if indeed the right to property is protected as entrenched in Canada whether it was included in the Charter of Rights or not, then quite possibly the United States would not be in a different position today if there was no mention of property in the Federal Constitution. Property would be an unenumerated but still, in some sense, fundamental right.

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<sup>26</sup> Tushnet, *supra* note 3, at 213.

<sup>27</sup> U.S. CONST. amend. XIV, § 1, cl. 3.

<sup>28</sup> *Id.* cl. 2.

<sup>29</sup> Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I (Canada Act, 1982, ch. 11, sched. B (U.K.)), as reprinted in R.S.C. app. II, no. 44 (1985).

<sup>30</sup> For a discussion of the debate and the protection of property under Canadian law, see ALEXANDER, *supra* note 25, at 40–49.